JUDICIAL INTERPRETATION OF THE CONSTITUTION ACT OF THE COMMONWEALTH OF AUSTRALIA

MORE than thirty years ago federalism was referred to as a "discovery or invention in the art of constitutional architecture," and as "a curious and complicated piece of legal mechanism." [1] The leading characteristics of federalism were then defined as (1) the supremacy of the constitution; (2) the distribution of the different powers of government among bodies with limited and coördinate authority; (3) the authority of the courts to act as interpreters of the constitution. Three federations familiar to the publicists at this time were the United States, Canada, and Switzerland; the Argentine federation, although formed in the middle of the nineteenth century, was practically unknown outside of South America. The constitutional system of the United States was looked upon as embodying to the fullest extent the three principles of federalism.

Since the appearance of Professor Dicey's analysis of the fundamentals of federalism this form of government has had an interesting growth not only among the South and Central American republics but also in the formation of the Australian Commonwealth and in the recently established South African Union.

In the enactment of the British North America Act and in its interpretation by Canadian courts and the Privy Council, Canada has developed a form of federalism in marked contrast with that of the United States.[2] Switzerland also has not accepted federalism according to American notions. The federal legislature, in the first place, is made the final interpreter of the Constitution and, consequently, the position of the Supreme Court is greatly decreased in importance. Moreover, under the Swiss system the executive exercises extensive powers within the scope of administrative law, which leaves a somewhat restricted field for the legislature and

[1] Professor A. V. Dicey, "Federal Government," 1 L. QUART. REV. 80.

[2] See "Judicial Review of Legislation in Canada," 28 HARV. L. REV. 565.

for the courts and which results in the absence of a separation of powers such as is in vogue in other federal systems. Finally, the necessity of a referendum on constitutional questions and the direct method of procedure for the submission of such questions render some of the fundamental concepts of federalism inapplicable. It remained for the Australasian federal conventions to enact a constitution in which an effort was made to reproduce the principles of federalism in accordance with the American model.

One year after the Convention met in Philadelphia and prepared the Constitution of the United States, Captain Phillips with a band of convicts landed in New South Wales and laid the foundation which later developed into the unique and interesting form of government known as the Commonwealth of Australia. Owing to the general policy of colonial government at the time and the peculiar character of Captain Phillip's settlement the colony he established was governed for more than forty years by autocratic governors. Gradually it became necessary to nominate a council to advise the Governor and then to arrange for the election of certain members of the council, thus laying the basis for a representative legislative body. As an outgrowth of remonstrances and opposition to autocratic power the home government was finally prevailed upon to grant responsible government, with one or both houses elective, to New South Wales, Tasmania, South Australia, and Queensland. About the same time that the grant of self-government was made the colonies themselves began the movement for federation which culminated in the establishment of the Commonwealth before the close of the nineteenth century.

The federation movement made little progress for more than twenty years and it did not become a vital issue of the colonies until the appearance of France, Germany, and the United States as rival colonizing countries. In 1883 the first Australian convention met in Sydney and announced an Australian doctrine similar to the Monroe Doctrine, to wit: The further acquisition of dominion in the Pacific south of the equator by any foreign power would be highly detrimental to the safety and well-being of the British possessions in Australasia and injurious to the interests of the empire. An outgrowth of this convention was the Federal Council of Australasia — the forerunner of the present federation. The experience gained through the council as well as a controversy over

military defense in the London Conference of 1881 led Sir Henry Parkes to undertake the calling of a national Australasian Convention. After considerable delay the Convention met in Sydney in 1891 and drew the famous Draft Bill which contains in substance the present Constitution. This Constitution was put in final form and adopted by the Convention of Adelaide in 1897. It received the Royal Assent in 1900 and went into operation on January 1, 1901.

Mr. A. Inglis Clark, who with Sir Samuel Griffith was the draftsman of the Bill of 1891, was strong in his admiration of American institutions. His knowledge of the constitutional history of the United States was profound and his zeal in advocating American principles had a marked effect upon the Convention. It is generally conceded that the fact that the Constitution of Australia so closely resembles that of the United States is due in a large measure to Mr. Clark.

"For my part," he said in one of his notable speeches, "I would prefer the lexis of the American Union to those of the Dominion of Canada. In fact I regard the Dominion of Canada as an instance of amalgamation rather than federation and I am convinced that the different Australian colonies do not want absolute amalgamation." [3]

Features of the Constitution Act

The Constitution Act of the Commonwealth of Australia gives evidence of a study and comparison of many existing constitutions. There is a distinct effort to combine the salient features of English parliamentary government with some of the notable principles of federal government as developed in the United States. In some instances the language of the Constitution of the United States is followed directly and there is an evident intent throughout to model the form of government after that of the United States and yet to leave the basic features of parliamentary government intact. While the term Parliament is used, the familiar American designation of the Chambers — Senate and House of Representatives — was adopted. A Governor General with powers similar to those exercised by the Crown in England and by the Governor General of Canada, a

[3] Wise, The Making of the Commonwealth of Australia, 74–76. See also pp. 118 and 230.

Senate with at least six senators from each state, a House based on an apportionment according to population, are all included among the salient features of the Act.

The powers of Parliament are specified in thirteen sections and include among other things the control of taxation, trade and commerce, foreign affairs, naturalization, and control of naval and military defenses; foreign corporations; currency, coinage, legal tender, and public credit, including banking and insurance; bills of exchange, promissory notes, bankruptcy and insolvency; lighthouses, etc.; quarantine regulations and fisheries in Australian waters; marriage and divorce; postal, telegraph, and telephonic services; invalid and old age pensions; conciliation and arbitration in industrial disputes; control of railways for naval and military purposes. In the scope of powers assigned to the federal Parliament the Constitution Act follows the Dominion of Canada rather than the Constitution of the United States. Finally, authority over matters incidental to the execution of any power has been vested by this Constitution in the Parliament, a provision similar to the elastic clause of the Constitution of the United States. Within one year the home government may disallow any law passed by Parliament. Provision is made for a Cabinet and Council of Ministers, similar to that of England. A judiciary consisting of a High Court is provided with jurisdiction to hear and determine appeals from lower federal courts and with original jurisdiction as to suits against the Commonwealth or its officers and suits between residents of different states. Parliament may confer original jurisdiction along other lines involving federal matters and has full power to define the jurisdiction of other federal courts.

Matters with regard to finance and trade are dealt with in considerable detail in a separate section, and in like manner separate consideration is accorded to the rights, duties, and obligations of states as well as to the admission of new states.

Amendments may be proposed by an absolute majority of each house, or by a second vote by absolute majority in one of the two houses, and when approved by a majority of the electors in a majority of the states become a part of the Constitution.

PECULIARITIES OF THE COMMONWEALTH CONSTITUTION[4]

1. The Commonwealth government is one of limited and enumerated powers and the parliaments of the states retain the residuary powers of government. In this respect the American rather than the Canadian plan is followed.

2. There is no general supervision of the state in the exercise of the powers belonging to it as is enjoyed by the Dominion Government over the provinces of Canada.

3. Declarations of individual right and the protection of liberty and property against the government such as exist in the United States are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution insures him.

4. The theory of the separation of powers after the model of the United States was adopted, but with certain well-understood limitations and modifications.

There is no doubt but that it was intended to establish legal limitations on the organs of government, and that it devolves upon the courts to define these limitations.[5] But attention is called to the fact that the greater number of cases in American courts which refer to the separation of powers have been decided not on the implied prohibition arising from the separation of powers, but upon express restraints imposed on the legislature such as the prohibition of bills of attainder or *ex post facto* laws and the prohibition against the state legislatures as to laws impairing the obligation of contracts, or the deprival of due process of law. Especial care must therefore be taken, say the Australian authorities, in the application of American precedents on this subject to a constitution where these additional restrictions do not exist.[6] The separation of powers in the states is held to be merely a rule of expediency subject to political sanctions.[7] As to the Commonwealth government, any attempt by the Parliament to set aside or reverse the judgment

[4] Cf. MOORE, COMMONWEALTH OF AUSTRALIA, 2 ed., 68–71.

[5] *Ibid.*, 94, 96, 97.

[6] On the effect of the lack of specific limitations, consult QUICK & GARRAN, CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH, 720–22.

[7] MOORE, 96.

of a court of federal jurisdiction, it is maintained, would be held void as an invasion of the judicial power. Whereas in America the ordinary rule of separation requires that the executive shall exercise no discretion in the making of rules and regulations except as to the details of administration,[8] the executive of Australia is specifically granted an ordinance power.[9]

5. In the distribution of powers the Constitution Act is more specific than the Constitution of the United States. There are matters:

(*a*) Exclusively federal, such as the location of the seat of government and the public property of the Commonwealth.

(*b*) Over which the power of the Commonwealth Parliament operates by way of paramount legislation merely, overriding any exercise by the state of its own power. This division includes such powers as are expressly granted to the Commonwealth but concerning which federal legislation is not adequate or exhaustive.

(*c*) Over which the Parliament of the Commonwealth and the parliaments of the states have concurrent and independent jurisdiction, such as taxation.

On a few subjects procedure is direct from the states to the Colonial Office in England and consequently these matters are not within federal jurisdiction. The most important are the allowance and disallowance of state legislation, the appointment and removal of state governors, and the amendment of state constitutions.

6. The establishment of judicial review in the High Court as to federal constitutional questions.

Each of the peculiar features of the Commonwealth Constitution might profitably be considered in detail, but it is intended at this time to deal particularly with the development of judicial review. After a prolonged controversy in which the representatives of the home government and a few of the Australian delegates aimed to establish an appeal to the Privy Council similar to that in force in Canada, the following section eventually was accepted by both parties and made a part of the Commonwealth Constitution:

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[8] See Field *v.* Clark, 143 U. S. 649 (1891).

[9] For a criticism of the American doctrine and a defense of the Australian plan, see MOORE, 99–101.

"Section 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State, or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."[10]

The language is sufficiently indefinite to leave some doubt as to the intention of the framers, but the majority of the Australian delegates accepted this wording on the belief that it gave practically final jurisdiction to the High Court on constitutional questions. The controversy which arose over the interpretation of the section is one of the most interesting raised in the history of self-government as well as one of the greatest issues of modern constitutional interpretation.

The interpretation of the Commonwealth Constitution was first presented to the court in *D'Emden* v. *Pedder*,[11] wherein was involved the Tasmanian Stamp Act, on which the question was raised whether the Act operated as an interference by way of taxation and consequent control with a federal agency or instrumentality. As a similar issue to that determined in *McCulloch* v. *Maryland* was raised, the court quoted freely from the American precedent and commended the opinion of Chief Justice Marshall. The doctrine of the immunity of federal instrumentalities from taxation as formulated in the McCulloch case was accepted and incorporated in the court's opinion and judgment. The intention to follow American precedents was thus expressed:

"When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from the provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."[12]

It was emphatically asserted to be the duty of the court to determine the validity of an attempted exercise of legislative power, and the principle was announced that

[10] For the history of the introduction and passage of this clause, consult QUICK & GARRAN, especially pp. 242, 247, 724, 735, 748–50.

[11] 1 C. L. R. 91 (1904).

[12] *Ibid.*, 113.

"if a state attempts to give its legislative or executive authority an operation which if valid would interfere to any, the smallest, extent, with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is invalid and inoperative." [13]

In supporting the judgment of the court, Justice Griffith maintained:

"We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance." [14]

In this, as in subsequent cases, it is evident that the High Court is definitely committing itself to the principles and the construction of constitutional law as adopted in the United States. The High Court, like the Supreme Court of the United States, assumes the rôle of guardian of the Commonwealth Constitution Act.[15]

The judicial controversy which has the greatest interest from the standpoint of constitutional law is *Wollaston's Case*, which involved an income tax act of the State of Victoria, held to apply to the salary of a Commonwealth officer.[16] By the Supreme Court of Victoria

[13] 1 C. L. R. 91.

[14] *Ibid.*, 112. In Municipal Council of Sydney *v.* Commonwealth of Australia, Justice O'Connor says: "The principles laid down by Marshall, C. J., in his historic judgment in McCulloch *v.* Maryland . . . are as applicable to the Australian Commonwealth Constitution as to the United States Constitution." 1 C. L. R. 208, 239 (1904). See also Jumbunna Coal Mine *v.* Victorian Coal Miners' Association, 6 C. L. R. 309 (1908).

[15] *Cf.* QUICK & GARRAN, 725. Also CLARK, AUSTRALIAN CONSTITUTIONAL LAW, 2 ed., 6, wherein the author maintains that "In regard to many provisions of the Constitution of the Commonwealth, the historic decisions of the Supreme Court of the United States which were delivered by Chief Justice Marshall and his associates during the first half century of the Republic cannot fail to be followed in Australia whenever the language to be interpreted is substantially the same as that to which the irresistible reasoning of those decisions was applied."

[16] *In re* The Income Tax Acts (No. 4), 28 V. L. R. 357 (1902). For a good account of this controversy, consult MOORE, Part VII, Chap. 3, on the Doctrine of the Immunity of Instrumentalities.

it was held that the principle laid down in *McCulloch* v. *Maryland* that a state of the Union has no power to impede or control any of the constitutional means to carry into effect federal constitutional powers has no application in construing the Commonwealth Constitution. The leading case in the United States, it was claimed,

"adopted a sweeping generalization which sought to decide once and for all those questions which might, by even distant possibility, arise, as well as those which had arisen." [17]

The court then referred to some recent decisions in the United States which tend to limit the principle of the McCulloch case and insisted that, while the actual instrumentalities of government of either the Union or of a state cannot be taxed by a state or by the Union, there is nothing in Chief Justice Marshall's decision to prevent the taxation of the property of a person who is merely an agent of Union or state. Reference was then made to the fact that the courts in Canada readily adopted the guidance of American decisions, although the constitutional position of the Dominion legislature in relation to those of the provinces was very different from that which prevailed in the United States.

"There are, however," says the court, "many essential differences between the Constitution of America and the Constitution of both the Dominion of Canada and of the Commonwealth of Australia. The Crown of England has always insisted on maintaining the prerogative right to disallow any legislation, either by way of ordinance of a Governor in Council in a Crown colony, or by Act of Parliament in any self-governing colony, and this right has been acted on, not very frequently, it is true, but still many times." [18]

Thus the right of disallowance for Australia was cited as evidence of an intention to give effect to a system of government fundamentally different from the American system.

On an appeal of *Wollaston's Case* to the High Court the principle announced in the case of *D'Emden* v. *Pedder* was emphatically reaffirmed.[19] In rendering judgment Chief Justice Griffith said:

"They [the judges of the Supreme Court of Victoria] said they preferred to follow the decisions of the Judicial Committee of the Privy Council upon the Constitution of Canada, suggesting that this court had

[17] 28 V. L. R. 384.
[18] *Ibid.*, 381.
[19] Deakin *v.* Webb, 1 C. L. R. 585 (1904).

indicated a disposition to show a preference for the American over the English decisions. This is, we think, a somewhat novel mode of dealing with a judgment of a court of final appeal. . . . It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English-speaking federations and deliberately adopted, with regard to the distribution of powers, the model of the United States, in preference to that of the Canadian Dominion." [20]

The scheme of the Canadian Constitution, it is particularly contended, was rejected by the framers of this Constitution, and especially is this true with respect to the distribution of powers between the federal government and the states and as to section 74 which relates to the final interpretation of the Constitution.

"We considered our judgment and have given it" said the court, "and, by the provisions of the Constitution, our judgment is final and conclusive."

The scheme of the Constitution plainly expressed is that for the determination of these constitutional questions this court is to be the tribunal of ultimate appeal, unless the court itself is satisfied that there is some special reason which would justify it in certifying that the question ought to be determined by the Sovereign in Council.[21] Canadian decisions such as *The Bank of Toronto* v. *Lambe* [22] were held to have no bearing on the case, and the court again cited Marshall's opinion in the Maryland case with the observation that the reasoning of that judgment appeared to be unanswerable. Continuing, Justice Griffith contended:

"In my opinion the principles applicable to the granting by the Judicial Committee of special leave to appeal from this Court or from the Supreme Court of a State are not applicable in this case. Grave responsibility is cast upon this Court by the Constitution. We know historically that that responsibility was only cast upon us after long consideration and negotiation. Various proposals were made, and the establishment of the Commonwealth very nearly fell through in consequence of the differences of opinion upon the point. The final solemn determination of the English Parliament, with the assent of Australia, was that that responsibility should be cast upon the High Court. I agree with Mr. Higgins that we should be guilty of a dereliction of duty almost amounting to a breach of trust if we were to decline to accept that responsibility

[20] 1 C. L. R. 604, 606. [21] 1 C. L. R. 621, 622. [22] 12 A. C. 575 (1887).

unless we were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why we were not, the proper ultimate judges of the question."[23]

Even more emphatic is the language of Justice O'Connor:

"So strongly do I feel that that duty has been cast on myself as a member of this Court, that I have no hesitation in saying, if we found that by a current of authority in England, it was likely that, should a case go to the Privy Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the Constitution as we believed it to be, it would be our duty not to allow the case to go to the Privy Council, and thus to save this Constitution from the risk of what we would consider a misinterpretation of its fundamental principles."[24]

The case did not end here, for it was soon appealed to the Privy Council, and in *Webb* v. *Outrim*[25] the court of appeal for the British Empire decided to uphold the state court and thereby overruled the judgment of the High Court in two of its greatest decisions.

"No restriction," says the Council, "on the power of the Victorian legislature in favour of such officer is expressly enacted by the Commonwealth Constitution Act, nor can one be implied on any recognized principle of interpretation applicable thereto."[26]

Moreover, the Council denied that the Commonwealth Parliament could take away the right of appeal in this case. The contention that such an act on the part of a state is impliedly forbidden by the Constitution after the analogy of Marshall's reasoning was thus disposed of:

"The analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. . . . The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a

[23] 1 C. L. R. 622. [24] 1 C. L. R. 631. [25] [1907] A. C. 81. [26] *Ibid.*, 81.

statute which, though within the legal power of the Legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such law, still, notwithstanding such condemnation, the statute in question is law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests." [27]

In reference to that part of the opinion which declares the United States Constitution a model for the Australian Constitution, Their Lordships say they "are not able to acquiesce in any such principle of interpretation." Neither of these sections (73 and 84) authorizes the Commonwealth Parliament, they claim, to take away the right of appeal in such a case as the one under consideration, nor does any other section directly give such authority.[28] For these reasons Their Lordships declined to acquiesce in the judgments rendered by the High Court.

When the issue was again presented to the High Court [29] it was held that the High Court was the ultimate arbiter upon all constitutional questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council, and the court was therefore not bound to follow the decision in *Webb* v. *Outrim*, but should follow its own well-considered decision. Chief Justice Griffith said that in *D'Emden* v. *Pedder* the court held

"that the doctrine laid down in the celebrated case of *McCulloch* v. *Maryland* was applicable to the Constitution of the Commonwealth of Australia. . . . In the case of *Deakin* v. *Webb* the Court again affirmed that rule, and, adopting the reasoning of the Supreme Court of the United States in the cases of *Dobbins* v. *Commissioners of Erie County* and *The Collector* v. *Day*, applied it to the case of a State income tax upon the emoluments of Federal ministers and members of Parliament." [30]

The Chief Justice continued:

"For the first time in the history of the British Empire a Court has been established as to which it has been declared that no appeal shall be

[27] [1907] A. C. 88, 89.

[28] *Ibid.*, 91.

[29] Baxter *v.* Commissioners of Taxation, 4 C. L. R. 1087 (1907). See also Commonwealth *v.* State of New South Wales, 3 C. L. R. 807 (1906), in which a transfer was declared a necessary instrumentality of the Commonwealth for the acquisition of land for public purposes and that the transfer was therefore exempt from state taxation.

[30] 4 C. L. R. 1100.

permitted from its decisions on certain questions unless the Court itself certifies that the question is one which 'ought to be determined' by the Sovereign in Council. These words cast upon the Court the duty of determining whether the question is such an one or not, and, if it thinks that it is not, it is its solemn duty to say so. . . .

"It appears to us that these considerations show that the High Court was intended to be set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as overruling its own decision on a question which it thinks ought not to be determined by the Privy Council would be to substitute the opinion of that body for its own, which would be an unworthy abandonment of the great trust reposed in it by the Constitution. It is said that such a state of things as would follow from a difference of opinion between the Judicial Committee and the High Court would be intolerable. It would not, perhaps, have been extravagant to expect that the Judicial Committee would recognize the intention of the Imperial legislature to make the opinion of the High Court final in such matters. But that is their concern, not ours. . . . For these reasons we are of opinion that this court is in no way bound by the decision of the Judicial Committee in *Webb* v. *Outrim*, but is bound to determine the present appeal upon its merits according to its own judgment. In other words, we think that this Court is in effect directed by the Constitution to disregard the unwritten conventional rule as to following decisions of the Judicial Committee in cases falling within sec. 74."[31]

The court concluded that the analogy between the Australian and the American Constitutions is perfect. The Privy Council temporarily at least accepted the situation by refusing to allow an appeal.[32]

The outcome of the controversy was the passage of the Commonwealth Salaries Act of 1907 which granted the states authority to impose a tax upon Commonwealth officers.[33]

By another act of the Commonwealth in 1907 an effort was made to prevent a similar controversy to that of *Wollaston's Case* by

[31] 4 C. L. R. 1102 *et passim*.

[32] [1908] A. C. 214.

[33] For the affirmance of this act, see Chaplin *v.* Commissioner of Taxes for South Australia, 12 C. L. R. 375 (1911).

requiring that state cases involving the construction of the Commonwealth Constitution be appealed directly to the High Court. According to all indications the High Court has won, although it is still claimed that the issue remains an undetermined matter in Australian constitutional law. According to Sir A. B. Keith,

"It is far from easy to predict the future of the doctrine of implied prohibition, for if the three senior judges [Griffith, Barton, and O'Connor] of the High Court are fully convinced of the principle which they have adopted from the first as the basis of the consideration of the Constitution, the two junior judges [Isaacs and Higgins] are evidently, if in different degrees, quite unwilling to admit its validity, and they have declared in open court that they do not consider themselves bound by it." [34]

A Commonwealth act, it is maintained, is powerless to undo what has been done and it cannot reverse the Privy Council. The Judicial Committee and the High Court each claim to be the final court of appeal on the interpretation of the Australian Constitution.

The principle of implied prohibitions was considered in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employes Association*,[35] in which the court applied the principle of previous cases to an attempted interference with the sovereign powers of the states by the exercise of the legislative or executive power of the Commonwealth. The rule laid down in *D'Emden* v. *Pedder* that when a state attempts to give to its legislative or executive authority an operation which, if valid, would interfere with the free exercise of the legislative or executive power of the Commonwealth, it is to that extent invalid and inoperative, is reciprocal, says the court. It is equally true of an attempted interference by the Commonwealth with state instrumentalities. The application of the rule is not limited to taxation. A state railway is a state instrumentality within that

[34] Keith, "Legal Interpretation of the Constitution of the Commonwealth," 12 J. Soc. of Comparative Legislation (N. s.) 120. For a criticism of the judgment and reasoning of the High Court, consult 2 Keith, Responsible Government in the Dominions, 821–37.

[35] 4 C. L. R. 488 (1906). For the significance of the rule laid down in this case, see Attorney-General for New South Wales *v.* Collector of Customs, 5 C. L. R. 818 (1908). See also King *v.* Sutton, 5 C. L. R. 789 (1908), in which the High Court appears to have held that the power to make laws with respect to foreign commerce belongs by implication exclusively to the Commonwealth Parliament.

rule with respect to the attempt to regulate the terms and conditions of the engagement, employment, and remuneration of servants.

Few decisions as significant as those relating to the immunity of instrumentalities from taxation have been rendered by the High Court, but the trend of constitutional interpretation is shown in some minor cases which may be briefly reviewed. It was very soon determined that the High Court will not decide abstract questions of constitutional law and that a complainant must show that he has personally been injured before he can have the constitutionality of a law tested.[36] The provision for the distribution of powers between the states and the Commonwealth was discussed in *King* v. *Barger* with the approval of decisions of the Supreme Court of the United States as to the distribution of powers and the insistence that a similar distribution was made in the Constitution Act.[37] In the State Railway Servants case the High Court held that the inclusion of disputes relative to employment on state railways was *ultra vires* as an invasion of the exclusive powers of the state.[38]

A clear presentation of the function of the High Court is given in the Union Label case [39] wherein the decision was rendered that the portion of the Trade Marks Act of 1905 establishing a workers' mark was *ultra vires* as involving the state power over domestic commerce and industry. Chief Justice Griffith maintained that

"It would indeed be a lamentable thing if this Court should allow itself to be guided in the interpretation of the Constitution by its own notions of what it is expedient that the Constitution should contain or the Parliament should enact. . . . Now, while there is no doubt that within the ambit of its powers the Parliament is supreme, it has no authority whatever beyond that ambit. . . . But it is for this Court to determine, when its interpretation is sought, whether an asserted authority is or is not conferred by the Constitution." [40]

[36] Bruce *v.* Commonwealth Trade Marks Label Association, 4 C. L. R. 1569 (1907). See also Attorney-General for New South Wales *v.* Brewery Employés Union of New South Wales, 6 C. L. R. 469 (1908).

[37] 6 C. L. R. 41, 67 (1908).

[38] The Federated Amalgamated Government Railway and Tramway Service Association *v.* New South Wales Railway Traffic Employés Association, 4 C. L. R. 488 (1906).

[39] Attorney-General for New South Wales *v.* Brewery Employés Union, 6 C. L. R. 469, 491 (1908).

[40] *Ibid.*, 500.

Justice Isaacs held that

"no considerations of expediency or desirability springing from any source whatever are permissible to the Court in determining the limits of an express and substantive power. It is a mere question of dry law as to the extent of the power granted, to be determined on ordinary legal principles." [41]

As to the right to decide on the validity of acts, Justice Higgins observed:

"Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to act in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are entitled to take out this last weapon from our armour; and the fact that the question raised in this case has not been argued before any other bench, and possibly may not be argued, or even arguable, on appeal from us, adds to the weight of our responsibility in making sure that there is a cause of action." [42]

Among the acts or portions of acts invalidated by the High Court are a state license act discriminating against the citizens of other states,[43] several sections of the Australian Industries Preservation Act of 1906,[44] an award of a federal court of conciliation and arbitration contrary to a prior award of a state wage board,[45] and the regulation of the Governor General pertaining to the publication of a list of subscribers connected with any telephone exchange.[46] On the whole the court has been rather liberal in its review of the recent acts developing and extending the federal powers as defined in the Constitution.

When an issue arose over the Royal Commissions Act of 1902–12 the court could not come to an agreement and availed itself of the power under section 74 to refer a question of constitutional interpretation to the Privy Council. The Council held the act *ultra*

[41] 6 C. L. R. 559.

[42] *Ibid.*, 590.

[43] Fox *v.* Robbins, 8 C. L. R. 115 (1909).

[44] Huddart Parker & Co., Ltd. *v.* Moorehead, 8 C. L. R. 331 (1909).

[45] Australian Boot Trade Employés Federation *v.* Whybrow & Co., 10 C. L. R. 266 and 11 C. L. R. 311 (1910).

[46] Commonwealth *v.* Progress Advertising and Press Agency Co., Ltd., 10 C. L. R. 457 (1910).

vires so far as it purported to enable a Commonwealth Royal Commission to compel answers generally to questions in relation to the intrastate sugar industry, or to order the production of documents relative thereto, or otherwise to enforce compliance by the members of the public with its requisition.[47] The Council seemed to recognize an error in its judgment in the Webb case by admitting that in fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. Recently a Commonwealth land tax assessment act [48] and an act limiting the power of the High Court with regard to awards of the Court of Conciliation and Arbitration [49] were held invalid.

Judicial Review in the States

As in the United States, the interpretation of the Constitution is not for the judiciary of the Commonwealth alone; it falls upon every court throughout the Commonwealth. Although every court of competent jurisdiction is an interpreter of the Constitution, and the High Court subject to an advisory review by the Privy Council is the authoritative and final interpreter of the Constitution, the state parliaments enjoy a position of independence unknown to the state legislatures in the United States, or to the provincial parliaments in Canada. This arises from the fact that few prohibitions on the states are included in the Constitution and there are no inhibitions arising from general phrases like due process of law and the impairment of the obligation of contracts. Furthermore the doctrine of implied prohibitions, although accepted by the judiciary, has been given by legislative enactment a very limited application.

The nature of judicial review in the states can best be indicated by some of the decisions in Victoria and in New South Wales. In Victoria it was decided as early as 1862 that the Supreme Court had power to examine the validity of an act of the state parlia-

[47] Attorney-General for Commonwealth of Australia *v.* Colonial Sugar Refining Co., Ltd., 17 C. L. R. 644 (1913). For a criticism of the action of the Privy Council in this case, see W. J. Brown, "The Nature of a Federal Commonwealth," 30 L. Quart. Rev. 301.

[48] Waterhouse *v.* Deputy Federal Commissioner of Land Tax, 17 C. L. R. 665 (1914).

[49] The Tramways Case, 18 C. L. R. 54 (1914).

ment.[50] It was declared to be the duty of the court on another occasion to interpret acts so as to carry out the manifest intention of the legislature, even though the court be compelled to strike out words to do so.[51] In the case of George Dill,[52] involving the question of constitutionality, the court observed:

"The case of the *Bank of Australasia* v. *Nias* was cited to shew that the Court has power to examine the validity of an Act of the Parliament of Victoria. Of this there can be no doubt. . . . The case of *Kenny* v. *Chapman* turned entirely on the question whether the Act No. 128 was valid. But this is a power which should in all cases be exercised by the Court with the greatest caution. A statute passed by the Supreme Legislature of the Colony with all the deliberation which our Constitution demands, ought not to be held invalid by the Supreme Court, except on the clearest and most cogent grounds, especially where it has passed that examination to which all Colonial Acts are subjected in England, and has not been disallowed. . . . The Act of the 20th Victoria, establishes a boundary of the privileges adopted. The Court, when occasions arise, must take care that the boundary is not overstepped. It is no answer to say that the task may, at times, be one of extreme difficulty. It is often so in other portions of our law. The Court must solve it in each case as it occurs."[53]

For New South Wales a similar precedent was established as early as 1861 in *Rusden* v. *Weekes*.[54] It was held that the courts of a colony have the power and are under obligation to decide whether an Act of the Colonial Legislature is in contravention of an Act of the Imperial Parliament and consequently not binding on the inhabitants of the colony. Justices Marshall and Kent were quoted in a citation of American cases. According to Justice Mulford

"where two laws are apparently inconsistent it is the province of the Court to reconcile them if possible, — if not, to say which is in force and which is not. . . . The fundamental principle of law as applicable to powers of colonial Legislatures is, that they may be controlled by the Imperial Parliament, and every Court must decide whether they have been controlled or not. It is not the duty of the Supreme Court more than any other Court to do this."

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[50] *In re* Dill, 1 W. & W. (L.) 171, 187 (1862).
[51] Regina *v.* Draper, 1 Vict. (L.) 118 (1870).
[52] 1 W. & W. (L.) 171 (1862).
[53] *Ibid.*, 187, 190.
[54] Legge 1406, 1416 (1861).

The extent of judicial control is evidenced in *Lazarus* v. *Stutchbury*, where it was held that although a rule of court was inconsistent with the terms of an act, but the practice of the court had followed the rule for twenty years, the practice must prevail.[55]

When the question was raised whether a power existed in a state court to grant a *mandamus* to compel a federal officer to perform duties imposed upon him by the federal parliament when the duties were to be performed within the state, Justice Owen remarked:

"There is no case analogous to this in any of the English cases that throws any light on the subject. We must go to some country where there are two such Constitutions as we have here, such as America and Canada. In America it had been decided over and over again that a mandamus will not lie in a state court to compel the performance of a duty by a Federal officer. That appears to me to be an analogous case to that now before the Court. The American decisions appeared to be based upon the principle of separate sovereignties, the Federal and the State Governments, and here the Federal Government and the State Government are two distinct entities, as distinct to my mind as if they were separated by territorial boundaries. I think that exactly the same principle must apply in dealing with the question in this State as would apply in America. For these reasons I am of opinion that we have no power to grant a mandamus to compel the Collector of Customs to perform duties imposed upon him by the Federal Parliament." [56]

In the Royal Commissions case the justices, quoting Sir Edward Coke, held that the king may constitute new courts of law with the assent of Parliament, but insisted that such courts must proceed by due process of law, and administer the law whether common law or statute law, so that the subject may know precisely how and by what law his case is to be dealt with. Consequently, a royal commission intended to inquire into a matter which was within the jurisdiction of the Court of Arbitration was held illegal. The theory of the separation of powers and of the independence of the courts were thus defended:

"No lawyer has ever ventured to contend that the prerogative of the King can be stretched so as to give him the right to interfere with the proceeding of Courts of Justice. Such an interference, whether it be by asserting a right to give judgments in disputes which are pending or

[55] 7 N. S. Wales L. R. 328 (1886).

[56] *Ex parte* Goldring, 3 N. S. Wales 260, 264 (1903).

to constitute an irregular Court of Appeal to revise the decision of a regular and constitutional Court, is, in my opinion, illegal."[57]

In *Crick* v. *Harnett*[58] a standing order of a legislative assembly relative to misconduct was attacked as being *ultra vires*. It was held by the court that the House had no power to pass the standing order, even though the order had been passed and had been approved by the Governor. Chief Justice Griffith, holding that the court had power to inquire into the validity of the standing order, said:

"It is obvious that a court of law has the duty of enquiry, should occasion arise, as to what are the inherent powers that must be implied from mere necessity, and would it not be more than strange if the Court was debarred from considering whether the Legislative Assembly, itself the creature of the Constitution Act, was, in a vital matter, exceeding the power expressly given to it by the Act. If the Court was so debarred, then indeed I know not to what excess standing orders might be passed, even to the extent of committing a member to a long term of imprisonment." [59]

Similar authority was exercised by the state judiciary when a portion of the Australian Agricultural Company Act was declared void.[60] On another occasion an act of Parliament giving the Crown power to invade private rights was construed strictly with the observation that

"private rights should be guarded and protected from invasion to a greater extent than the law allowed. When a private right is invaded it is no answer to say that it is for the public good. It is altogether contrary to constitutional principles to permit the invasion of private rights." [61]

Subsequently a New South Wales law excluding Australian native-born convicts was declared *ultra vires*.[62]

For the states the principle had been long established that the colonists carry with them only so much of the English law as was considered applicable to their own situation — the applicability of

[57] *Ex parte* Leahy, 4 N. S. Wales 401, 425 (1904).

[58] 7 N. S. Wales 126 (1907).

[59] *Ibid.*, 133. When this issue was carried to the Privy Council the decision of the Supreme Court was reversed on the ground that it was impossible to say upon a fair view of all the circumstances that the standing order in question did not relate to the orderly conduct of the Assembly. See 7 N. S. Wales 451.

[60] See *v.* Australian Agricultural Company, 10 N. S. Wales 690 (1910).

[61] Allen *v.* Foskett, etc., 14 N. S. Wales S. C. R. 456 (1876).

[62] Rex *v.* Smithers, 16 C. L. R. 99 (1912).

any law being a question for judicial determination as occasion arises.

Constitutional Interpretation and Judicial Review in Australia, Canada, and the United States Compared

Lawyers and the courts in Australia are constantly making comparisons with the law and the practice of judicial review in similar federations, particularly Canada and the United States.

It was intended throughout the movement which resulted in the formation and adoption of the Constitution Act to create a form of union which differs fundamentally from the union of the provinces of Canada. This intention is apparent in the rejection of the Canadian plan of retaining reserved powers in the Dominion and enumerating the powers of the provinces and also the rejection of the Canadian scheme of executive veto over provincial legislation. The difference between the Constitution Act and the British North America Act seemed to the founders of the Australia federation so marked that in defining the new government they refused to accept the term "Dominion" and adopted "Commonwealth" [63] instead.

"It is a curious fact," says the Canadian commentator Lefroy, "that whereas the Canadians living alongside of the United States endeavored when confederating to reproduce British forms and principles rather than American whenever the two differed, the Australians have very largely preferred the latter." [64]

The distinction between the Constitution Act and the North America Act is further evidenced by the fact that the Australian courts refused to follow the Canadian Supreme Court and the Privy Council in determining the doctrine of implied prohibitions and in the insistence on retaining section 74 in the Constitution, whereby the High Court has refused to accept the right of review of the Privy Council on constitutional questions.

In comparison with the federal system of the United States the

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[63] On the significance of the selection of name, consult Moore, 66, 67.

[64] Lefroy, "The Commonwealth of Australia Bill," 15 L. Quart. Rev. 156. "It seems a pity that the Australians should destroy the symmetry of things by preferring the word 'Commonwealth' with its decidedly American flavour. However, in like manner they prefer 'States' to 'provinces' and most deplorable of all, as it seems to me, the term 'House of Representatives' to that of 'House of Commons,' with all its honoured associations," 156–67.

Constitution Act shows striking similarities, first in the distribution of powers between state and federal authorities, and second in the evident intention to adopt American principles of judicial review of legislative acts and judicial interpretation of the Constitution itself. In a number of instances the language of the Constitution of the United States is followed and a similar interpretation is accepted by the courts. A large part of the constitutional law of Australia, it is frequently claimed, has been taken from the legislation of the Congress and the decisions of the Supreme Court of the United States. The similarity in this respect is greatly increased by the extent and freedom with which Australian judges make use of American judicial precedents. In accepting the American doctrine of judicial review, Justice Clark observed:

"so great and momentous a power has probably never been vested in any other judicial tribunal in the world, and the impregnable position assigned to the Supreme Court of the United States may always with pardonable pride be claimed by the advocates of a republican form of government as having been first exhibited to the world in association with republican institutions." [65]

As in the United States, the power is nowhere expressly granted in the Constitution but is held to exist as an incident of judicial power. It is held to belong of right to all courts within the Commonwealth.

Certain differences between the two federations are worthy of note. One difference to which Australian writers usually refer is the extent of popular participation in the making of the Constitution.

"The federation of Australia was a popular act, an expression of the free will of the people of every part of it, and therein, as in some other respects, it differs in a striking manner from the federation of the United States, of Canada, and of Germany." [66]

Moreover, the Australians did not see fit to enact as a part of their Constitution the provisions which are familiarly known as the Bill of Rights of American constitutions. Nor did they insert any of the general phrases, such as due process of law and equal protection of the laws, which have been such a fruitful field for the judicial

[65] CLARK, 5.

[66] MOORE, 64. In comparison with the United States "the most scrupulous care was taken to make the popular participation a reality and not a fiction," 66, 67.

mind in the effort to limit legislative action. With no inhibition as to the obligation of contracts and no due process restriction, the states of the Australian Commonwealth have a freedom which the states of the United States do not enjoy.[67] In Australia, where there is no background of enumerated and implied individual rights secured against legislative invasion, there is a strong presumption in favor of the power of the legislature as against that of the other organs of government.

There is a disposition to claim also that American courts have gone too far in interposing limitations to legislatures and to charge that judges in the United States have a tendency to make rather than to interpret the law. Thus it is contended that

"the freedom with which American Judges resort to first principles is remarkable. They build up a theory of sovereignty and, in fact, construct laws on that basis, in a manner comparable to that which would be followed by an International Jurist in dealing with some branch of his science not yet covered by authoritative practice. The reasoning of Marshall (making allowance for the fact that he was dealing with popular sovereignty) is such as might have been used by an early jurist in formulating the immunity of a foreign ambassador from local taxation." [68]

In this connection it has been held that an implication as a basis for legislative restrictions must be necessary, not conjectural or argumentative.

While apparently the states of Australia are more favorably situated than those of the federal system of the United States, there is a decided tendency toward centralization which may change the federal relations so as to curtail considerably the range of state powers. That the states are destined to a subordinate position is the judgment of some careful students of Australian affairs.[69] In view of the wide range of subjects which is accorded to the Commonwealth it is thought that the control of state legislation will tend to become as extensive as that of the Dominion Parliament over provincial legislation in Canada.

From the standpoint of constitutional law by far the most

[67] MOORE, 314–15; also 342.

[68] F. L. Stow, "Federal and State Constitutional Domains," 5 COMMONWEALTH L. REV. 10.

[69] See especially the opinion of Sir C. Ilbert, 12 J. SOC. OF COMPARATIVE LEGISLATION (N. S.) 30. Also Lefroy, 15 L. QUART. REV. 162–63.

important feature of the Constitution Act is section 74, which seems to bring to pass the prediction of Justice Clark that constitutional law in Australia will be largely the product of Australian lawyers. By the interpretation of this section the judicial independence of the Commonwealth appears to have been established and there is afforded the opportunity to which Australians looked forward — that of determining for themselves the great issues of public law and of rendering a contribution to the jurisprudence and constitutional law of the world.

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